THE TRANSPORTATION ACT OF 1920

The railroad legislation enacted by the last Congress, officially designated as "Transportation Act, 1920," is the first constructive railroad legislation enacted by Congress since the land grant acts passed in 1863 and 1866.

The Interstate Commerce act of 1887 was enacted for the purpose of correcting certain evil practices which had grown up under unregulated private operation. The railroad managers prior to the enactment of that law not only failed to observe the obligations imposed upon those engaged in a public service undertaking, but were even ignorant that there was any substantial difference in the laws relating to a public calling and to a private business—hence corrective legislation was necessary.

It was not until about 1910 that public attention began to be called to the fact that the railroads were failing in their primary function, namely, in rendering adequate service. Beginning about that time there was increasing complaint against the quality of service rendered.

Coincident with this change in situation was the enactment of the amendment of 1910 to the Interstate Commerce act, which gave to the Interstate Commerce Commission the power to suspend schedules of rates filed by the carriers. In other words, at the very time when the railroads were realizing the necessity of extensions and improvements, and at a time too when prices and costs of operation were advancing, a restriction was placed upon the ability of the railroads to increase their revenue without securing the approval of public authorities.

The Interstate Commerce Commission has been criticized for failing during the last decade to recognize the increasing difficulty which the railroads were having in raising money for their requirements. The adverse decisions of the commission in the Advance in Rates case in 1910, the Five Per Cent case in 1914, and the Fifteen Per Cent case in 1917, are cited as evidences of the lack of vision on the part of the commission in anticipating the increasing demands for transportation service.

To one who has studied those rate cases it is apparent that the railroads raised issues which either were not relevant or, if relevant, were not sustained by the evidence which they introduced. Under the law the commission was obliged to decide the issue upon the evidence introduced at a public hearing. Upon the evi-

dence, and upon the issues raised by the railroads, it is difficult to see how the commission could have decided otherwise, although the outstanding fact remains that about 1910-1914 there began a change in the price level, resulting in higher operating cost, which would have justified and perhaps which demanded increases in rates.

Period between 1916 and 1920.

Beginning about 1915 or 1916, it became apparent to Congress as it had been for some time to the railroads and to the public that the railroad transportation system was not meeting the transportation requirements of the country. There began also to be a feeling in Congress that this situation was not due so much to the shortcomings of the railroads as to the shortcomings of legislation. Upon the recommendation of the President a Joint Committee of Congress was appointed to investigate the railroad problem. This committee, composed of five members from each committee of the House and Senate on Interstate Commerce, commonly known as the Newlands Committee, began its hearings in November, 1916, and were continued into the spring of 1917, when the war postponed further hearings. During that time, however, the railroad officials made a very powerful plea for constructive legislation. The signing of the armistice, with the certainty of a return of the railroads to private operation, compelled an intensive study of the question by Congress. During the year 1919 the Interstate Commerce committees of both houses separately held extended hearings and went into the whole question with painstaking care.

Congress was confronted with the immediate problem of enacting legislation vitally necessary to meet the condition arising upon the return of the railroads to private management. It also recognized that the unsolved problem of a permanent regulatory policy must be solved if private operation were to be a success.

The legislation finally enacted is an attempt to meet both of these problems. The House passed the so-called Esch bill, which dealt largely with perfecting the existing machinery of regulation; the Senate passed the Cummins bill, which was a radical departure from existing regulatory legislation. The bill as it came out of conference and was enacted into law was largely a combination of these two bills, with some important modifications.

The act provided that federal control of the railroads should terminate on March 1, 1920, and on that date most of the provisions of the new act went into effect.

Provisions relating to termination of federal control.

The first part of the act deals with the termination of federal control and its provisions are transitory in their nature, although of vast importance to the railroads. Some of these provisions have now ceased to operate, and others are of little importance to the public.

Had the railroads been turned back to private operation on March 1, 1920, without sustaining legislation there would have been general disorganization and not a little bankruptcy among the carriers. Congress very wisely provided, therefore, that for a period of six months after March 1, 1920, the United States would pay to the carriers, who elected to take it, the same rate of compensation which had been paid to them by the government during its operation. A carrier was not obliged to accept this guaranty. If it did accept it, the carrier was obliged to pay over to the government whatever it earned in excess of the guaranty. Most of the carriers accepted the guaranty. This provision of the act is now a matter of history, but there is no doubt that it prevented what might have been a serious financial crisis.

The act also provides methods for the settlement of matters arising out of federal operation. Proper machinery is provided for the settlement of disputes. As the government contracted to turn the railroads back to their owners in substantially the same condition in which they were when it took them it is readily seen that there are opportunities for protracted litigation, and that it will be many years before all of these disputes are settled. The Director General of Railroads, as appointed by the President under the new act, is, therefore, little more than an adjuster of claims. During government operation large sums of money were expended by the government in the acquisition of equipment and in the extension of facilities generally. Under the terms of the contract between the government and the railroads this raised an obligation on the part of the railroads to repay the government for such expenditures. The act provides, in a general way, that the debts owed to the government, with certain set-offs for sums owed by the government to the railroads, may be funded for a period of ten years at 6 per cent interest.

It was recognized by Congress that upon the termination of federal control many of the carriers would not be able to raise money for necessary extensions upon their own credit, and therefore $300,000,000 was appropriated to be used as loans to the railroads "for the purpose of enabling carriers . . . properly to serve the public during the transition period immediately following the termination of federal control."

The fundamental features of the act.

Those features of the act to which reference has been made were vitally important to the carriers in their relations with the government. Some of them have served their purpose and others are still in operation, but they deal with the adjustment of things which have passed. The interest of the public is now in those operations of the act which deal with the permanent problem of regulation. Many amendments were made to the Interstate Commerce act which are of importance, but of minor significance as compared to three or four fundamental features of the act which will be referred to.

The labor problem.

The two outstanding problems which confronted Congress in considering legislation were, first, how to deal with the labor problem so as to prevent interruption in transportation, and, secondly, the passage of legislation which would enable the credit of the railroads to be reëstablished. The labor question is always charged with political dynamite. The Senate committee and the Senate itself handled the problem with striking courage. The bill which passed the Senate provided for compulsory arbitration of labor disputes, and made the finding of the arbitration tribunal of binding effect. It further made the combination of employees substantially to interrupt transportation an offense. The House committee approached the problem with a full appreciation of its momentousness, but in the firm belief that the solution was not to be found in any law preventing strikes. It reported a provision carefully worked out, but somewhat complicated, for the compulsory submission of disputes to boards of arbitration, but did not go so far as to declare strikes unlawful. The House, however, rejected the provision and enacted an extremely weak voluntary arbitration provision, which it is commonly reported was prepared by the railroad brotherhoods.

The provision as it came out of conference and as it was finally enacted, contained no prohibition against strike, but may prove to be as effective as such a prohibition. The strength of the labor provision lies in its eminent fairness, and whether it will be successful in preventing the interruption of transportation may be determined before this article appears in print and therefore it is not proposed to indulge in any prophesies.

It is made the duty of the carriers and the employees "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees." This is merely a warning both to the railroad officials and to the employees that they must try to get together. It represents no departure from previous policy, for there have been few strikes without previous efforts to arrive at an agreement.

It is then provided that railroad boards of labor adjustment *may* be established by agreement between the railroads and the employees. If such an adjustment board on any particular railroad or group of railroads is established by agreement, then, either upon the request of the carrier, or of the employees, or upon the employees' own motion, or upon the request of the Railroad Labor Board (hereinafter to be referred to), such board shall hold a hearing, take testimony, and decide any dispute involving "only grievances, rules, or working conditions."

It is to be observed that if a board of adjustment is agreed upon, then any party in interest may set in motion the machinery necessary for a decision by that board. The board has power to summon witnesses and to compel their attendance and the production of documents. This board has no power to determine wages. It has no power to enforce its decision. The effect of the decision is merely that of any voluntary board of arbitration. Compliance with the decision rests upon the force of public opinion. The subjects which it deals with are of minor general importance, and it is reasonable to suppose that its decisions will be fair and will be acquiesced in by the employees.

The question of wages, however, is left to a board called the Railroad Labor Board, of greater dignity and permanency, the members of which are appointed by the President. Three of the members are appointed from nominees named by the employees, three from nominees of the railroads (the nominations being made under regulations made by the Interstate Commerce Commission),

and three appointed directly by the President, who are representatives of the public. The members of the board each receive $10,000 a year salary, and the board has its headquarters at Chicago, with power to sit elsewhere. It has power to compel the attendance of witnesses and the production of papers.

This board has wide authority. It is its duty to hear and decide:

1. Disputes involving grievances, rules, or working conditions when an adjustment board has been unable to reach a decision.

2. Disputes involving grievances, rules, or working conditions where no adjustment board has been organized and application is made by the carriers or by the employees for a hearing, or where the Labor Board itself is of the opinion that the dispute is likely substantially to interrupt commerce.

3. Disputes involving wages, hearing to be held upon application of the carriers, or the employees, or upon the board's own motion.

A decision requires the concurrence of at least five members of whom one at least shall be a representative of the public. Inasmuch as the act provides, in effect, that any increase in wages is directly borne by the public, it is necessary that representatives of the public should have some voice in determining the question.

Again, there is no penal provision for compelling compliance with the decision of the Labor Board, but it is provided that "all decisions of the Labor Board shall be entered upon the records of the Board and copies thereof, together with such statement of facts bearing thereon as the Board may deem proper, shall be immediately communicated to the parties to the dispute, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine."

The strength of this labor legislation rests upon the existence of permanent machinery for settling disputes. If the employees should strike without resorting to the machinery provided by Congress, the striking employees would at once lose all popular support, and this in itself is a serious deterrent to hasty action—at least by the more conservative railroad brotherhoods. The law was not successful in preventing the so-called outlaw switchmen's strike, but it was an exceedingly hopeful sign that this strike was condemned by the brotherhoods, and that the Railroad Labor Board refused to hear the grievances of the switchmen upon any conditions whatsoever.

The law provides that the Railroad Labor Board shall establish just and reasonable wages.

In determining the justness and reasonableness of such wages and salaries or working conditions the board shall, so far as applicable, take into consideration among other relevant circumstances:

1. The scales of wages paid for similar kinds of work in other industries;
2. The relation between wages and the cost of living;
3. The hazards of the employment;
4. The training and skill required;
5. The degree of responsibility;
6. The character and regularity of the employment; and,
7. Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.

No fairer standard of the reasonableness of wages could possibly be determined.

If the law proves inadequate to prevent the interruption of transportation by strikes there can be little doubt that the Congress of the United States will be prepared to enact more drastic legislation, for the temper of the people and their overwhelming necessities are such that interference in transportation can not and will not be tolerated.

The financial provisions.

Adequate service depends largely upon adequate facilities. The facilities cannot be secured without the ability to raise money by the issuance of capital obligations. Bonds and stocks cannot be sold unless the revenue is sufficient to give assurance that interest and dividends will be paid. The rates for transportation must be such as to yield such adequate revenue, and at the same time they must not be more than is necessary to accomplish this result. Public utilities cannot be operated as a source of private profit beyond the amount necessary to establish proper credit.

The fundamental principles of the problem as finally recognized in the Transportation act were first presented to the Senate Committee on Interstate Commerce by the Associated Industries of Massachusetts, in January, 1919.[1] The act cannot be understood without a thorough understanding of what that problem is. One of the principal difficulties in securing a general increase

[1] Hearings before the Committee on Interstate Commerce, United States Senate, on Extension of Tenure of Government Control of Railways, pp. 704-738.

in rates during the last ten years has been the ever present idea in the mind of the commission that an increase in rates which would give only sufficient revenue to the majority of railroads would give a revenue greatly in excess of the needs of the strong roads. This is inevitable under a competitive system of transportation. Take for example the cases of four competing systems in the Middle West, the Chicago, Burlington & Quincy, the Chicago & Northwestern, the Rock Island, and the Chicago Great Western —all systems which compete for a very considerable portion of their traffic. During the three pre-war years the Burlington earned on an average more than 25 per cent on its capital stock; the Chicago & Northwestern about 12 per cent, and the other two railroads only about 1 or 2 per cent. These three pre-war years were the best years, on the average, which the railroads ever had, and yet two of these four large systems were unable to establish their credit on the existing basis of rates. If rates were raised to a point which would establish the credit of the two weaker roads it would result in giving the Burlington and the Chicago & Northwestern revenue vastly in excess of the amount necessary to establish their credit. On competitive systems rates must be the same, otherwise the system having the lower basis of rates will secure the competitive traffic and the condition of the poor roads would be hopeless.

To Senator Albert B. Cummins of Iowa is due the credit of recognizing the problem and of formulating legislation calculated to solve it. This principle is stated with clearness in that section of the Transportation act which is probably its most fundamental section. Section 422, paragraph (5) is as follows:

> Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

In order to solve the problem arising out of the competitive situation, the act provides a method entirely new to rate regu-

lation, upon the successful operation of which depends the ultimate question of whether the railroads can be successfully operated under private management.

The first step is for the commission to determine the value of the railroad properties. Congress has followed the general trend of economic thought and the practice of public tribunals in utilizing valuation as the basis upon which return must be reckoned. The public is gradually coming to the conclusion that valuation is only of importance in protecting the private rights of the carriers, and offers very little help in determining what revenue is necessary in order to enable the carriers properly to perform their functions.

The next step in the process, after value has been fixed, is to determine whether the railroads of the country shall be treated as a whole, or shall be divided into rate and valuation groups. The commission has the option of treating the country as a whole or of dividing it into any number of such groups. When the groups have been determined and the valuation of the railroads within each group arrived at, the commission, for the two years beginning March 1, 1920, "shall initiate, modify, establish or adjust" rates so that "under honest, efficient and economic management and reasonable expenditures for maintenance of way, structure and equipment," the carriers shall earn a net railway operating income equal to 5½ per cent on the aggregate value. The commission, "may, in its discretion, add thereto a sum not exceeding one half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment."

It is to be observed with care that the commission is not to establish rates so that each railroad shall earn 5½ or 6 per cent on its value (for under competitive conditions this would be impossible), but that the rates shall be established so that the carriers as a whole or in such groups as the commission may determine shall earn the designated return. Under such an adjustment railroads, because of greatly varying earning powers, may earn little or nothing on their value, or may earn 10 or 15 per cent, or even more.

Six per cent on the value of the railroad property may mean 8 or 9 per cent on its capital stock, depending upon the relative amount of stocks and bonds and the interest which the bonds

carry. Such an amount of earnings applicable to interest or dividends may be sufficient to establish the credit of a majority of the railroads within a common territory, under present conditions. Congress very wisely refrained from exercising its legislative judgment in determining what rate of return would be necessary two years from now.

After March 1, 1922, the commission is given the broadest latitude in determining what is a fair return upon the value of the railroad property. Paragraph (2), in part, is as follows:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

This is the delegation of a tremendous power to the commission. It may be a delegation going beyond the constitutional limitations of the power of Congress. Nevertheless the commission is obviously the tribunal best equipped to determine the rate of return which is necessary in order to accomplish the results set forth in paragraph (3), namely: "In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

The rate of return on the value of the property must always be translated into terms of return applicable to the payment of interest and dividends on securities before it is possible to determine whether any rate of return is adequate to establish credit. During the period of about ten years preceding the war an average net return of about 8½ or 9 per cent available for dividends was necessary in order that a railroad might issue its stock at par. With the general increase in price level doubtless a larger amount

of net income may be necessary if money is to be raised by the issuance of securities.

Many problems will confront the commission in determining what is a fair return. If Congress meant by "fair return" merely the protection of the carriers' constitutional right against confiscation, hardly satisfactory results will be accomplished. The phrase ought to be interpreted to mean such a rate of return as will enable the carriers properly to finance their requirements. If "fair return" means merely the minimum return guaranteed under the constitution, it would seem quite clear that Congress could not delegate such an authority to the commission. If "fair return" means such return as is adequate to establish the credit of the railroads it would seem to be a proper delegation of authority. The determination of what is necessary for this purpose involves careful study of fluctuating market conditions, and the commission is obviously in a position better to determine this from time to time than the Congress of the United States. It would seem pretty clear from the language of paragraph (3) that the latter interpretation is correct, for the commission is called upon to give due consideration to the transportation needs of the country and the necessity of enlarging facilities in order to provide adequate transportation. The determination of the amount of total revenue based upon value of railroad properties may be the only practicable way of arriving at the amount which is necessary to accomplish the purposes of the act, but such an amount must be translated into terms of income applicable to interest and dividends before the judgment of the commission can properly and effectively be exercised.

Then follows the provision, which was so bitterly opposed by the strong railroads, that any railroad earning 6 per cent on the value of its property should pay to the government one half of the difference between such 6 per cent and the amount earned. This amount over 6 per cent, commonly called excess profits, goes into two funds—the share of the railroad and the share of the government. The share of the railroad is hedged around with certain restrictions and can be used only for certain purposes. It must go into a reserve fund and can be drawn on only "for the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads," until such reserve fund is "equal to five per centum of the value of its railway property."

After the fund reaches this amount it may be drawn upon for any other lawful purpose.

The half of the excess profits which goes to the government is placed in a fund called "the general railroad contingent fund," which becomes a revolving fund administered by the commission. "It shall be used by the Commission in furtherance of the public necessity in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers."

We have here, therefore, an attempt to solve the ever present problem of the weak and the strong roads. A method is provided for transferring from the strong roads a portion of their excess profits which are utilized for the purpose of providing the weak roads with credit and facilities. Although this provision was attacked by the railroads as unconstitutional during the pendency of the bill in Congress, it is believed that under sound economic and legal principles there is no constitutional objection to it.

Consolidation of railroads.

It was the belief of the Senate Committee on Interstate Commerce that the problem of the weak and the strong roads ultimately should be solved by the consolidation of the various railroad systems into a limited number of large systems. It was proposed in the bill which passed the Senate that the railroads should be consolidated into not less than twenty nor more than thirty-five systems which should be so arranged that competition would be preserved. It was proposed that a plan of consolidation should be prepared along such lines, and that for the period of seven years consolidations could voluntarily be made according to the plan, but that at the end of seven years consolidation should be compulsory. By establishing competing railroads of substantially the same financial strength it would thus be possible to do away with the necessity of transferring any excess profits of the strong roads for the benefit of the weak roads. It is well known that Senator Cummins held most tenaciously to this consolidation plan, but in conference was obliged to sacrifice it in order to secure an agreement.

The act, however, provides for consolidations, but not for compulsory consolidations, and this feature is important and may in practice prove so satisfactory that the original Senate plan of a few strong competing railroads may be worked out.

Paragraphs (4) and (5) of Section 407 provide that competition shall be preserved as fully as possible and that the systems shall be so arranged that the same rates on traffic will provide substantially the same rate of return upon the value of the respective properties.

The successful operation of the consolidation plan depends, of course, entirely upon the attitude of the stockholders of the corporations. There was a time when the managers of the railroads were somewhat imperialistic in their conceptions, when the strong roads would eagerly have seized this opportunity to consolidate other lines, and even weaker lines, into their systems, but because of the scantiness of earnings of late years there is some serious doubt whether the strong lines will want to dilute their earnings by taking in the weaker lines.[2]

Exclusive federal control over the issuance of securities.

One of the difficulties which in the past has confronted the railroads in raising money is that the approval of every state in which the railroad is incorporated, and even in states in which it is not incorporated but through which it runs, must be secured. The legislatures and the state commissions have often imposed onerous conditions before giving their approval to the issuance of securities. For example, at the time of the consolidation of the New York Central system the state of Illinois imposed a license fee of $600,000, while the other states through which the system ran imposed only nominal charges. The Arizona commission attempted to impose a condition upon the Southern Pacific, when it asked approval for the issuance of $30,000,000 in securities, that a certain portion of the proceeds should be expended—in the judgment of the railroad unwisely—within the limits of the state. Furthermore, it sometimes happens that the laws of the states through which a railroad runs may be so conflicting as to make it

[2] Section 407 also authorizes pooling under authority of the Interstate Commerce Commission, provided such pooling does not unduly restrain competition. It is doubtful if this becomes important unless the railroads are taken over by the President in time of war under his power conferred by the act of August 29, 1916.

practically impossible to secure the approval of all commissions to the financial plan determined by the railroad.

The new act gives to the Interstate Commerce Commission exclusive jurisdiction over the issuance of securities, and thus greatly simplifies the mechanical processes of securing approval and prevents improper restrictions by state authorities. There is one power given to the commission which may prove embarrassing if the commission should unwisely assume an authority which properly belongs to management, and not to regulation. The commission must determine whether the purpose for which the money is to be expended is "reasonable, necessary, and appropriate" for the proper performance of service to the public. It also gives to the commission absolute authority to prescribe the terms and conditions under which the securities shall be issued.

If the commission should exercise the authority which is given it, it would be obliged to determine many of the details of management. It would have power to determine, and it may be that under the act it would be compelled to determine, for example, whether a certain terminal should be enlarged, whether a certain line should be double-track, whether a certain type of car or locomotive should be used; and in this way it would substitute its own judgment for the carefully formed judgment of the board of directors. One of the evils of regulation of public utilities is the danger that powers of management will be assumed by public authorities. Such authorities are not in position to determine, as a practical matter, the extent or need of improvements. If we are to have private management we must place upon the managers the largest possible measure of authority, and must not destroy their initiative. The Interstate Commerce Commission up to the present time has given no indication that it will seek unnecessarily to cross the line of proper regulation and assume the responsibilities of management. In some matters which have come before it, it has very clearly indicated that it does not purpose to assume such responsibility.

A second important result accomplished by exclusive federal regulation is that financial manipulation under the lax laws which exist in some states will be impossible. It provides a restraint which, if it had existed twenty-five years ago, would have prevented many of the recent railroad scandals.

Power over intrastate rates.

One of the most unfortunate results of state regulation has been acts of the legislatures and orders of the commissions establishing intrastate rates upon a lower basis than corresponding interstate rates, with the inevitable result that interstate traffic was curtailed and a proper portion of the transportation burden was not borne by the purely state business. The avowed purpose of some of the states in exercising their power over intrastate rates was to construct a traffic barrier at their boundaries in order to encourage the development of their own industries. The long controversy which has existed between Texas and Louisiana is only one of many instances of this kind. The result of such a narrow state policy has ordinarily been to compel the railroad to reduce its interstate rates to the level of the intrastate rates, and thus to deprive it of revenue which was sorely needed.

The commission is not given the power to initiate state rates, but it is given the power to establish such rates when the existing state rates unjustly discriminate against interstate or foreign commerce. Whenever state rates are involved the commission may confer with the state commissions, but its judgment as to the effect of state rates on interstate commerce is final.

Car service.

During the pendency of the Cummins-Esch bills the provisions relating to "car service" received little public attention, and yet contained in a few brief sections of the act relating to this subject are some of the most far-reaching and important powers which ever have been conferred upon the commission. The so-called Esch act, approved May 29, 1917, gave to the commission certain powers relating to the control of the movement of cars. With the exception of these limited powers the Interstate Commerce Commission has had little power over railroad operations. Its powers were confined largely to questions of rates. By the new act it is given tremendous power in the regulation of service.

Section 402, paragraphs (10) and (11) give to the commission this power. These paragraphs are as follows:

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transpor-

tation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Under this provision the commission not only can regulate the movement of cars and locomotives but by order can compel the railroads to purchase all classes of equipment.

Other paragraphs of the car service section give equally great powers to the commission. Under paragraph (14) the commission may determine the compensation which one railroad shall pay to another for the use of cars. This is a control over what is commonly known as "per diem," or the amount of daily rental paid by one company to another while the cars of such company are used by the other company. No subject in intercorporate relations has been more acrimoniously discussed among the railroads than this subject of car rental. The importance of it is readily seen by considering the fact that if the rental is low there is an incentive for a railroad not to provide itself with its own cars, but to use those of other companies; whereas if it is high there is a tendency to build cars for the purpose of renting them to other companies.

One of the difficulties encountered in conducting transportation by numerous carriers is the impossibility of properly coördinating the use of cars, and to some extent the use of locomotives. Shortage of cars often exists in one section with surplus of cars in others. There has been no central authority which could equalize conditions. That power is now given to the commission under paragraph (15) of section 402; this gives the commission power to suspend all rules relating to the movement and interchange of cars, and to require not only the common use of cars and locomotives but also of terminals.

The effect is to enable the equipment of the carriers to be utilized in the most effective manner. It is an attempt to remedy the most serious difficulty in independent operation by a multitude of carriers. If the power is exercised with intelligence and moderation it will accomplish almost as much for effective operation of railroads as any provision of the Transportation act. It

is bound, however, to occasion much complaint, for any effort to supply the shortage of equipment in one section of the country or in one industry may result in depriving other sections of the country or other industries of the car supply which they may require.

The exercise of this power will undoubtedly result in utilizing to its fullest capacity the existing equipment, with the consequent result that such vast sums will not have to be invested in equipment as would be required if each section of the country were dependent for its car supply upon the equipment of the carriers serving that section.

One of the powers conferred upon the commission by section 402 is the power when shortage of equipment or congestion of traffic, or other emergency requires immediate action, "to give directions for preference or priority in transportation, embargoes, the movement of traffic under permit, at such time and for such periods as it may determine." This is a power which is greater than ever was conferred upon any department of government in time of peace. In June of this year the commission, acting under this authority, ordered all open top cars to be sent to coal mines. This resulted in depriving shippers of other commodities which used such equipment of all transportation. The result of the order was to put a stop very largely to construction of buildings and of highways which required sand, gravel, and stone—articles which could be transported only in open top cars. It had a paralyzing effect upon many lines of industry. It may be that the commission properly exercised its power because of the great urgency for the transportation of coal. It may have been a wise exercise of power and have prevented greater suffering than would have resulted from a free use of such cars for all purposes. The point is not the wisdom of the act of the commission, but the tremendous power over industry which was given to the commission by this act. Power over priority in transportation in time of war was undoubtedly necessary in order that the imperative needs of the Army and Navy might be met. It is a grave question whether such a stupendous power ought to be conferred upon any regulating tribunal in time of peace. No power has a greater tendency to transfer the obligations of management to a regulatory body and to result in tremendous centralization of power in a governmental body.

Extension and abandonment of line.

During the intensive period of railroad building a quarter of a century and more ago many railroads were projected which were not required, with the result that traffic which could be handled by one railroad was often distributed over two or more, with the result that all the competing lines were unnecessarily handicapped in the securing of adequate revenue. Under the terms of the act, —paragraphs (19), (20), and (21) of Section 402— no new railroad and no extension of an existing railroad can be made without a certificate from the commission that such railroad or extension is in the public interest. It is also provided that no line can be abandoned without the consent of the commission.

Long and short haul amendment.

The principal cause of controversy over the regulation of railroads during the last forty years has arisen from the practice of railroads when competing with other railroads, or with water lines, to meet the competitive rate at the competitive point, with the consequent result that the rates to the intermediate or non-competitive points are higher than the rates to the competitive points. This practice has an economic justification, but that is of little consolation to a community which sees freight passing through destined for a more distant point and carried at a rate often very materially less than the rate to an intermediate point.

Under the Interstate Commerce act, as amended in 1910, departures from the requirements of the rigid long and short haul rule were permitted only upon approval of the Interstate Commerce Commission. The commission, however, recognized the economic necessity of a lower charge to the more distant point under competitive conditions and very freely granted authority to meet the competition without reducing intermediate rates. The Transportation act (section 406) is an attempt to reconcile the two contending forces. This has resulted in the enactment of a provision which is not clear and which undoubtedly will be the subject of litigation. The commission is given authority to relieve a carrier from the operations of the rigid long and short haul section, "but in exercising the authority conferred upon it in this proviso the commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed."

What "reasonably compensatory" means no one will know until the courts have finally interpreted the phrase. Fortunately, the Interstate Commerce Commission has a very just appreciation of the economic conditions necessitating the lower charge to the competitive point, and if the amendment can be construed to recognize the continuance of competition—and the maintenance of competition is the underlying principle of the entire act—it can be depended upon to exercise a reasonable and just discretion in authorizing departures from the rigid requirements of the clause.

Division of rates.

The vast bulk of transportation is over more than one railroad. The rates are ordinarily joint rates and the division of the rates among the carriers rests upon agreement between them. Heretofore the commission has had no power to fix the proportion of the revenue which should go to the several carriers—that is, in technical terms, to fix the divisions, except when the commission established a through route and a joint rate and the carriers were unable to agree among themselves as to the proper divisions.

The Transportation act (section 418) gives to the commission power upon its own motion, or upon the complaint of a carrier, to establish these divisions. Equally important with this new power is the rule which Congress has laid down for the commission to follow in making these divisions. Paragraph (6) provides that the commission, in establishing divisions, shall take into consideration, among other things, the fair return on the value of the railroad property of the respective railroads as well as all the factors relating to the relative cost of transportation.

The real significance of this mandate is that it enables the commission to carry out to some extent the fundamental principle underlying the Transportation act, by enabling the commission to transfer from the stronger lines to the weaker lines some part of their surplus earnings, not, of course, arbitrarily, but within the terms of the mandate. For example, if one of two railroads, under the adjustment of rates prescribed by the commission, earns more than a fair return on its property and the other road earns less than a fair return, the commission must take this fact into consideration. It must also give consideration to the relative cost of operating. If it believes that a carrier has not been able by private agreement to receive a division of the rates sufficient to

overcome any greater cost of operation, as, for instance, if the carrier is a terminal railroad it must compensate the carrier for its added cost.

Power of the commission to establish minimum rates.

Until the passage of the Transportation act the commission had no power to fix a definite rate, but merely power to establish rates which should be regarded by the carriers as the maximum rates. In the past the carriers, in fierce competition for traffic, have sometimes established rates which were probably so low as not to pay out-of-pocket expenses, with the result that a higher burden was thrown upon other traffic. Sometimes in the competition of carriers serving the various ports from the great grain-producing territories the carriers entered upon rate wars which seriously affected the stability of rates. At times the carriers, in order to meet water competition, would reduce their rates to the competitive point to such a basis as to kill the boat lines. The power to establish minimum rates was given for the purpose of correcting these practices.

Miscellaneous provisions.

There are other provisions of the Transportation act which are of more or less importance, but space does not permit discussion of these amendments. There are amendments dealing with the limitation of time within which actions may be brought against the Railroad Administration and against the carriers; routing of freight by the commission; power of the commission to provide credit rules for the collection of freight charges; power of the commission to authorize the continuance of the American Railway Express Company; power to simplify rules relating to filing of rates; additional powers over the establishment of through routes and joint rates; the inclusion of stockyard charges in the through rate; limitation of the time for the suspension of rate schedules; encouragement of water transportation; power to examine correspondence of the officers of a carrier; limitation of the liability of a rail carrier for loss by a connecting water carrier; unlawfulness after December 31, 1921, for any person to hold the position of officer or director of more than one carrier unless authorized by the commission; increase in the number of commissioners to eleven and increase of salaries to $12,000; additional

power in prescribing bills of lading; power to compel the installation of automatic train control devices.

Conclusion.

The outstanding feature of the Transportation act is that it is radically constructive. While there are many corrective features there are helpful features from the point of view of railroad operations. Its main purposes are to establish the credit of the railroads upon a basis which will not put too great a burden upon the users of the railroads, and to give to the Interstate Commerce Commission such powers as appear necessary in order to correct the faults inherently arising in independently operated railroads. The truly remarkable thing is that a comprehensive and properly articulating act has been constructed out of two bills so radically different as the Senate and House bills.

The conciseness and clearness of the language of the act is no less noteworthy. There is little ambiguity, except perhaps in the long and short haul provision, which was intended to be ambiguous.

Although the act may not fully solve the underlying problem of the weak and the strong railroads, it is a mighty step in that direction and subsequent legislation will probably be merely supplementary.

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